No. 88-1643

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM E. STEPHENSON,

Petitioner,

v.

McLEAN CONTRACTING COMPANY, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Did the Circuit Court of Appeals correctly sustain the holding of the District Court that Petitioner was not a seaman under the Jones Act as a matter of law?

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IV. CITATION TO OPINION BELOW

The citation of the Fourth Circuit decision below is:

Stephenson v. McLean Contracting Company, Inc., 863 F.2d 340 (4th Cir. 1988).

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V. STATEMENT OF THE CASE

Respondent, McLean Contracting Company, Inc., is a contractor specializing in heavy construction. Respondent was awarded the contract to build the struts, piers and a portion of the roadway of a bridge spanning the Choptank River in Maryland, involving work on land and on the river itself. Petitioner, William E. Stephenson, was hired by Respondent as a licensed welder. When he was hired, Petitioner was informed that he would be assigned work on and off a crane barge as a welder, but that he would be expected to perform other tasks related to the bridge construction as needed.

Petitioner was assigned to the crane barge "Annapolis" which was engaged in constructing the bridge struts and piers.

During the nine months he worked on the bridge prior to his accident, Petitioner spent about fifty percent (50%) of his time in welding activities, and the bulk of the remainder marking and moving bridge support pilings, pouring concrete, building false-work, placing reinforcing steel, assisting in pile driving and other construction activities. From time to time, Petitioner, who is not a licensed seaman, would assist in handling barge and push-boat lines bringing construction materials to the job site, and occasionally hooking up the anchor buoys to the crane boom or setting lights to mark the stationary barge at night, or to illuminate the site for night work.

On the day of the accident, Petitioner was ordered to the crane barge "Newport

News", similar to but smaller than the "Annapolis", which was tied along side a cofferdam. The cofferdam consisted of four steel sides driven into the river bottom, forming a water-tight box, from which the water had been pumped exposing the bed of the river, on which concrete had been poured forming a solid surface.

Petitioner left the "Newport News", and entered the cofferdam in order to use his welding torch to cut steel pilings off at a particular height. Petitioner was walking along a horizontal beam inside the cofferdam when he slipped and fell to the concrete river bottom sustaining injury.

Petitioner received compensation benefits, and then filed suit in the United States District Court for the District of Maryland under the Jones Act, and for

unseaworthiness. After extensive discovery Respondent filed a motion for summary judgment on all issues on the ground that as a matter of law, neither the cofferdam nor the crane barge moored alongside were vessels in navigation, that Petitioner's duties were not primarily and naturally in aid of navigation, that he was not permanently attached to any vessel, that the unseaworthiness of no vessel caused or contributed to the accident nor was Petitioner performing a seaman's work when injured, and that therefore, Petitioner's sole remedy is worker's compensation, either state or federal. The motion and opposition contained voluminous citations to discovery.

The District Court denied the motion and trial commenced. After two days of testi-

mony in Petitioner's case, the District Judge suspended the proceedings and granted Respondent's motion on all counts. In ruling on the Jones Act issue, the District Judge expressly assumed without deciding that Petitioner was permanently attached to a vessel in navigation, but ruled that his duties were not in aid of navigation in the broadest sense.

Appeal was taken by Petitioner to the Fourth Circuit Court of Appeals on the Jones Act and unseaworthiness issues. Petitioner's Petition to this Court followed the Court of Appeals opinion sustaining the judgment of the District Court. Petitioner's Petition does not preserve any issue relating to the lower court's rulings on unseaworthiness.

VI - SUMMARY OF ARGUMENT

The decision of the Fourth Circuit correctly affirmed the District Court's granting of Summary Judgment for Respondent on the ground that Petitioner had failed to prove facts sufficient to permit a jury to conclude that he was a seaman for Jones Act purposes. Petitioner's deposition and testimony clearly showed that he was a construction worker on a bridge construction project and that duties, such as handling lines or moving anchors, were purely incidental. The District Court applied the Fourth Circuit's three prong test and assumed that Petitioner was permanently assigned to a vessel in navigation, thereby meeting two prongs of the test.

The third prong, duties serving primarily to aid in navigation in its

broadest sense, which Petitioner failed to meet, looks to aiding the transportation function of the vessel.

The decision below is in accord with the decisions of this Court, which have continually affirmed the requirement for seaman status that job duties naturally and primarily aid in navigation in a broad sense. Looking at the transportation function of the vessel broadens the test beyond traditional seaman duties.

The Fourth and Seventh Circuits have adopted this broad test and although the Fifth Circuit has adopted a somewhat more lax test, the facts of this case mandate the same result under any of the tests so that no conflict among the Circuits is presented.

Petitioner's other issues do not present proper grounds for review.

VII - ARGUMENT

A. THE GROUNDS FOR REVIEW PRESENTED BY PETITIONER

Our reading of the Petition suggests that Petitioner asserts four grounds for the granting of the Petition (Petition at 3-4):

(1) The opinion below conflicts with prior decisions of this Court; (2) the opinion below conflicts with decisions of other Courts of Appeal; (3) there are a large number of persons interested in clarifying Jones Act issues; and (4) the courts need guidance on the effect of the 1972 amendments to the Longshoreman and Harbor Workers Compensation Act, 33 U.S.C. Sections 901, et seq. ("L.H.W.C.A.").

The Rules of this Court set forth examples of grounds upon which the Court may grant a petition for writ of

certiorari, two of which are arguably invoked by Petitioner: first, when there is a conflict among the circuits, Sup. Ct. R.17(a), and second, when a court of appeals has decided a federal question conflicting with decisions of this Court, Sup. Ct. R.17(c). Both grounds will be addressed in this Brief.

The third ground does not present any legal issue supporting granting the Petition, and the fourth ground, relating to the 1972 L.H.W.C.A. amendments, is not expounded upon in the Petition and Petitioner cites no legal error below regarding it. Therefore, these issues will not be addressed.

B. THE DECISION BELOW WAS IN CONFORMITY WITH SETTLED LAW.

1. SUMMARY JUDGMENT IS AN APPROPRIATE MEANS OF DECIDING JONES ACT CASES.

Although the determination of crew member status for Jones Act purposes is dependent largely on the facts, South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 257-9, (1940), Desper v. Starved Rock Ferry Co., 342 U.S. 187, 190, (1952), the discretion allowed the jury or other fact finder is no different than in any other case, and a jury decision must have a reasonable basis. See, Senko v. LaCrosse Dredging Company, 352 U.S. 370, 374, (1957).

In a proper case this Court has sustained reversal of a jury verdict finding Jones Act status on the ground that there were insufficient facts as a matter of law. Desper v. Starved Rock Ferry Co., supra. Summary judgment and related proceedings have become an important way of disposing of Jones Act

cases where the facts are such that a jury ought not be permitted to conclude that seaman status exists. Eg., Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986); Johnson v. John F. Beasley Construction Co., 742 F.2d 1054 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985), Whittington v. Sewer Construction Company, Inc., 541 F.2d 427 (4th Cir. 1976); Powers v. Bethlehem Steel Corporation, 477 F.2d 643 (1st. Cir. 1973).

Therefore, the mere fact that the lower court disposed of Petitioner's case on summary judgment is well within established practice.

2. THE TEST APPLIED BY THE COURTS BELOW WAS CORRECT.

a. THE USE OF A NAVIGATIONAL TEST CONFORMS TO THE HOLDINGS OF THIS COURT.

The test developed by the Fourth Circuit Court of Appeals for determining Jones Act status correctly conforms to prior decisions of this Court.

The Fourth Circuit test reached mature form in Whittington v. Sewer Construction Company, supra:

> "To qualify as a 'member of the crew' under the Jones Act one must be more or less permanently attached to a vessel or fleet, he must be one whose duties serve 'naturally and primarily as an aid to navigation' in the broadest sense, and the vessel must be in navigation."
> 541 F.2d. at 436 (footnotes omitted)

The Fourth Circuit, in this case, held Whittington to be controlling, and pointing out that the District Court had assumed that petitioner had satisfied two of the three prongs of the test (permanent attachment to a vessel in navigation), but the remaining (second) prong was at

issue: whether Petitioner's duties served naturally and primarily as an aid to navigation. Stephenson v. McLean Contracting Company, Inc., 863 F.2d 340, 341 (1988).

Therefore, this argument will address only the "naturally and primarily in aid of navigation" portion of the Whittington test (hereinafter, the "navigation test").

The navigation test as applied to Jones Act jurisdiction first finds expression in decisions of this Court in South Chicago Coal & Dock Co. v. Bassett, supra, in which the Court discussed the statutory exclusion under L.H.W.C.A. for a "master or member of a crew of any vessel", 33 U.S.C. § 903(a), and described the kind of crewmember who would be excluded from coverage as "those employees ... who are naturally and primarily on board to aid

in ... navigation". 309 U.S. at 260.

The Bassett test received further elucidation in Norton v. Warner Company, 321 U.S. 565 (1944) where the employee apparently sought to become a crewmember in order to receive the liberal benefits of the Jones Act. The Court cited the Bassett navigation test, and said:

> "But navigation is not limited to 'putting over the helm'. It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can 'hand, reef and steer'."
> 321 U.S. at 572.

The next full decision on the navigational test is Senko v. LaCrosse Dredging Corporation, supra. That case held that where the injured worker was employed almost solely on a vessel (dredge), with responsibility to maintain it, there was sufficient evidence to go to a jury on seaman status where the worker "would have

a significant navigational function when the dredge was put in transit". 352 U.S. at 374.

Three short per curiam decisions of the Court have been cited as relevant to the navigation test. The first is Gianfala v. Texas Company, 350 U.S. 879, (1955) which reversed a Fifth Circuit decision without comment, citing Bassett and several Circuit Court of Appeals decisions. While the Court did not make clear the basis of its holding, the Fifth Circuit had held below that a case involving undisputed testimony on Jones Act status "presents under this evidence not a question of fact to be determined by a jury, but a question of law to be determined by the judge...". Texas Company v. Gianfala, 222 F.2d 382, 386 (5th Cir. 1955), rev'd per curiam,

Gianfala v. Texas Company, supra. The decision arguably reflects disagreement with a too rigid approach to withdrawing a case from the jury. See, Offshore Company v. Robison, 266 F.2d 769 (1959).

In the second per curiam decision, Grimes v. Raymond Concrete Pile Company, 356 U.S. 252, (1958), the District Court had indicated that the evidence created a fact question on the issue of crewmember status, with which the Court of Appeals disagreed. Citing Senko, Gianfala and Bassett, the Court reversed without discussion, presumably because the District Court had indicated the existence of a factual issue.

In the last per curiam decision, a divided Court held without recitation of facts, that an evidentiary basis existed for a jury to decide whether the tug

involved was in navigation, and then to decide whether the deceased worker was a seaman and whether his death was caused by negligence. Butler v. Whiteman, 356 U.S. 271, (1958). Bassett was cited by the Court in support.

It is clear that the navigational test was not eroded or altered by the Gianfala, Grimes and Butler decisions as has been suggested by the Fifth Circuit in Offshore Company v. Robison, supra, because in a case decided shortly thereafter, Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129 (1959), the Court clearly affirmed the continuation of the navigation test, citing Bassett, Desper, Grimes, Butler as cases supporting the proposition that a determination of navigational duties at the moment of injury may be critical.

Therefore, the navigational test as announced in South Chicago Coal & Dock Co. v. Bassett, supra, and as elucidated in later decisions, continues unabated and was correctly relied on by the courts below in this case.

b. TRANSPORTATION FUNCTION IS A PROPER INGREDIENT OF THE NAVIGATION TEST.

Petitioner complains that the navigation test applied by the Court below incorrectly included reference to the transportation function of the vessel, and while Petitioner seems to feel that the earlier decisions of this Court support such an element, the later decisions do not. (Petition at 18). As we have seen, however, the navigational test has been passed from decision to decision since its inception in Bassett without diminution.

In adopting a navigation test which includes a "transportation function of the vessel" element, the Seventh Circuit in Johnson v. John F. Beasley Construction Company, supra, pointed out that Bassett and Norton emphasized duties tied to the transportation function of the vessel so that the test becomes:

> "Whether the employee contributes to the maintenance, operation or navigation of the vessel as a transport on water, that is critical for Jones Act purposes." 742 F.2d at 1061.

Therefore, the test has broadened considerably beyond the traditional deckhand's duties in accordance with the dictate of Norton v. Warner Company, supra.

The District Court opinion below cited the Johnson case and held that Petitioner not being engaged in contributing to the transportation function of the vessel was

dispositive under the navigation test (Petition at A15-A17), which the Fourth Circuit affirmed. The Fourth and Seventh Circuits are entirely correct in linking seaman status to the transportation function of the vessel, which is a navigational test in the broadest sense and complies fully with the decisions of this Court.

3. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN THIS CASE.

If there are no conflicting facts or conflicting inferences from undisputed facts, then the case can be decided as a matter of law. See, Desper v. Starved Rock Ferry Co., supra. Here, the decisions below were based on Petitioner's own testimony without regard to any conflicting evidence, and any conflicting inferences were resolved in his favor by

giving him the benefit of two of the three prongs of the Fourth Circuit test.

Sometimes the job duties performed by the injured person are crucial to a determination of seaman status, Braen v. Pfeifer Oil Transportation Co., supra, 361 U.S. at 131. Here, Petitioner was performing his usual welding services, not on a vessel, but in a fixed cofferdam forming a dry construction site for a bridge pier. There is nothing maritime about such employment.

In other cases, as Braen points out, a larger view must be taken of the injured person's job duties, because non-maritime employment at the moment of injury will not necessarily destroy seaman status already obtained. Id., 361 U.S. at 132; compare Desper v. Starved Rock Ferry Co., supra. See, Barrett v. Chevron U.S.A.,

Inc., supra, 781 F.2d at 1075.

Unlike in Braen, however, Petitioner had no history of duties which were "naturally and primarily ... to aid in ... navigation ... aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker". South Chicago Coal & Dock Co.v Bassett, 309 U.S. at 260.

From Petitioner's testimony, the record discloses that the only activity which he was involved in during the nine months of employment before his injury were of the sort just quoted from Bassett and were insufficient as a matter of law to allow a finding of seaman status. Johnson v. John F. Beasley Construction Co., supra; cf. Barrett v. Chevron U.S.A., Inc., supra, 781 F.2d at 1074.

C. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

Petitioner cites decisions of the Fifth and Seventh Circuit Courts of Appeals in support of his argument that this case presents a conflict among the circuits which the Court ought to resolve.

As previously discussed, under the issues presented by this case, the Fourth and Seventh Circuit navigational tests are identical, and the Seventh Circuit would have reached the same result as was reached below. See, Johnson v. John F. Beasley Construction Company, supra (summary judgment affirmed against foreman on bridge construction project injured on a crane barge).

The Fifth Circuit, however, has adopted a more liberal test in Offshore Company v. Robison, supra, recently reaffirmed in

Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986). The Seventh Circuit had earlier criticized the Robison test for weakening the navigational aspect. Johnson v. John F. Beasley Construction Company, supra, 742 F.2d at 1061, and compare Barrett v. Chevron U.S.A., Inc., supra, 781 F. 2d at 1073 and 1076 (concurring opinion).

Even under the Fifth Circuit's weakened navigational test, however, the present facts would require granting summary judgment for Respondent, which, under the Barrett case is required in proper cases. 781 F.2d at 1074.

In Barrett, a welder on various offshore drilling platforms brought suit under the Jones Act. Although seventy percent or more of his time was spent on platforms, not on auxiliary vessels, at

the time of his accident Barrett was performing welding services on a barge next to a fixed caisson tied into the underwater pipeline system. Barrett was injured while being transported to the barge, and later on the barge itself.

Although Barrett deals primarily with the issue of the employee's permanent assignment to a vessel as an element in finding seaman status, the opinion makes it clear that that issue is inextricably bound up with the issue of actual job duties performed:

> "Whether Barrett was a crew member should have been determined in the context of his entire employment as a welder's helper ..."
> 781 F.2d at 1076.

The Fifth Circuit then held that the District Court should have granted summary judgment against Barrett on the issue of Jones Act seaman status.

The present facts would require summary judgment under any of the Fourth, Fifth and Seventh Circuit tests, so that this case presents no conflict among the Circuits requiring resolution by the Court.

D. CONCLUSION

For the reasons advanced herein, McLean Contracting Company, Inc. respectfully requests the Court to deny the Petition for Writ of Certiorari.

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